

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 3161 OF 2004

Nehru Nagar Shivalaya Co-operative)
Housing Society Limited,)
6/38, Nehru Nagar,)
Kurla (East),)
Mumbai-400 024)...Petitioner

V/s.

Smt.Vidya Dilip Naik)
3/120, Nehru Nagar,)
Kurla (East),)
Mumbai - 400 024)...Respondent

Mr.S.G. Bhandary i/b. M/s.Bhandary & Bhandary for the
Petitioner.
Mr.P.G. Lad for the Respondent.

CORAM : V.M. KANADE, J.

DATED : APRIL 27, 2007

ORAL JUDGMENT :-

1. Heard the learned Counsel for the petitioner and
the learned Counsel for the respondent.

2. The petitioner is a society which is registered
under the Maharashtra Co-operative Societies Act. The
respondent who is the member of the said society is in
occupation of tenement no.208 in Building no.6 of Nehru
Nagar, Kurla (East), Mumbai - 400 024. The said

building was constructed by MHADA and the forty tenements in the said building were allotted to the persons who were eligible to occupy the said premises. The tenement viz. room no.208 was initially allotted to one Umakant Phatarphod and later on, it was transferred in her name. The said Umakant Phatarphod is the uncle of the respondent and after no objection was given by him, the tenement was transferred in the name of the respondent. The petitioner was running the Balwadi in the said premises since 1985 and there was also an application for transfer of Balwadi by the respondent. She had mentioned in the said application that the said premises were being used for running a Balwadi and even in the inspection report which was submitted by the reporting officer, it was mentioned that the disputant was running Balwadi i.e. 'Mini Nursery'. On 17th July, 2000, the original opponent no.2 one Shri Ram Hotwani distributed pamphlets under the letterhead of the society and it was mentioned in the said letter that the society would take action against the respondent for conducting Balwadi in the premises. The dispute was filed by the respondent in the Co-operative Court in

view of the threats which were given by the said Ram Hotwani and others and in the dispute, it was prayed that the members of the society should be restrained from interfering with the nursery classes which were conducted by the respondent, save and except by due process of law. Initially, the respondent had claimed interim relief. Exparte interim relief was granted, however, this exparte injunction was vacated on 12th June, 2001. Appeal which was preferred against the said order was also rejected by the appellate court. After written statement was filed by the respondent i.e. petitioner herein, evidence was led by the parties. The Co-operative Court dismissed the dispute which was filed by the respondent. Being aggrieved by the said order, respondent preferred an appeal before the Maharashtra State Co-operative Appellate Court, Mumbai. The appeal was allowed and the petitioner herein were restrained from entering the premises and/or interfering with the functioning of the Balwadi or nursery classes which was run by the respondent without following due process of law.

3. Being aggrieved by the aforesaid order which is passed by the Maharashtra State Co-operative Appellate Court, Mumbai, the petitioner has filed this present petition under Article 226 of the Constitution of India.

4. The learned Counsel for the petitioner submitted that the Co-operative Appellate Court has erred in relying on Regulation 51 of the Development Control Rules. He invited my attention to the said Regulation and pointed out that the proviso to Regulation 51 merely stipulated that permission had to be obtained from the Commissioner before putting the said residential premises for being used as a Balwadi. He submitted that since the said permission was not obtained, the use by the respondent as a Balwadi was clearly illegal and therefore, the respondent was not entitled and had no right to claim an order of injunction. It is submitted that the Co-operative Appellate Court, therefore, had committed an error of law which is apparent on the face of record. He submitted that the respondent was not residing in the said tenement and the nuisance was caused to all the residents of the said building. He

submitted that it was admitted by the respondent in her evidence that the permission as required under Section 51 had not been obtained by her and there were about 50 students who were admitted in the said Balwadi. It is submitted that this admissions itself is sufficient to show that the said premises were being used for illegal purposes and therefore, there was no reason for the appellate court to interfere with the reasoned order which was passed by the trial Court. He submitted that therefore, the said order was liable to be quashed and set aside.

5. The learned Counsel for the respondent, on the other hand, submitted that the said Balwadi was in existence since 1985 and that no objection has been taken by anyone except Shri Ram Hotwani. He submitted that even earlier, said Opponent no.2 had not taken any objection. He submitted that two residents from the said tenements who were examined, also have stated that no nuisance was caused as a result of the said Balwadi. It is submitted that the order passed by the Appellate Court was a well reasoned order and therefore, no case

was made out for interfering with the judgment and order passed by the appellate court.

6. In my view, the submission made by the learned Counsel for the petitioner cannot be accepted. It is no doubt true that permission has not been obtained so far by the respondent herein from the Bombay Municipal Corporation. Perusal of Regulation 51 discloses that even in purely residential zone, ancillary use of the premises to the extent of 50 per cent of the floor space is permitted. Regulation 51 reads as under :-

"Purely Residential Zone (R-1 Zone)-Ancillary uses permitted

. Apart from residential use, the following uses and specified ancillary uses to the extent of 50 per cent of the floor space of the principal use shall be permitted in buildings, premises or plots in the purely residential zone:-

- (i) xxx
- (ii) xxx
- (iii) xxx
- (iv) xxx

(v) Educational buildings, excluding building of trade schools but including students' hostels in independent buildings, religious buildings, community halls, welfare centres and gymnasias :

. Provided that the Commissioner may, by order, permit Montessori schools, kindergarten classes or bal-mandirs in a part of a residential building on the ground floor or on the floor above the stilts if the area thereof is not less than 40 sq.m. and no nuisance is likely to be caused to the residents of the building:

. Provided further that in congested localities where it is not possible to provide a separate building for a school, the Commissioner may allow a primary school in any part of or on any separate floor of a residential building. In doing so, he shall take into account the location, room sizes, means of access, water and sanitary arrangements and other relevant factors. He shall also ensure that a staircase is easily accessible from the entrance and serves the classrooms. The school shall also conform to other requirements of educational buildings stipulated in Regulation 40."

7. Perusal of the aforesaid Regulation discloses that ancillary use as provided in the said Regulation is permitted. It, therefore, cannot be said that running Balwadi in the residential premises is per se illegal. It is an admitted position that the respondent has already applied for permission from the Bombay Municipal Corporation and that the said application is still pending. The submission made by the learned Counsel for the petitioner could have been accepted if the Municipal

Commissioner had rejected the application which was filed by the respondent seeking permission for running a Balwadi. Another fact which has come on record that the Balwadi is being run for the last more than 22 years i.e. since 1985. The society was registered in 1996, so even before the registration of the society, Balwadi was being run in the said premises.

8. The learned Counsel for the petitioner could not point out when a query was made by this Court as to whether any resolution had been passed by the society prohibiting the respondent from running the said Balwadi. The only resolution which apparently is passed by the society is to file a dispute against the respondent. In the evidence of the two witnesses who have been examined by the respondent, it can be seen that they have stated that the no nuisance is caused as a result of the Balwadi which run into two shifts between 8.00 a.m. to 10.00 a.m. and 11.00 a.m. to 1.00 p.m. In any event, the only order which has been passed by the Co-operative Appellate Court is to restrain the petitioner from disturbing the possession

of the respondent and from interfering with the activity of Balwadi which is run by the respondent without following due process of law. It is, therefore, always open for the petitioner to take such steps in law to restrain the respondent from carrying out the said activity. It is an admitted position that so far, BMC or MHADA Authority have not taken any action against the respondent. The said order of injunction apparently had been passed in view of the action on the part of the Opponent No.2 Shri Ram Hotwani who had threatened the respondent herein and had also pasted pamphlets on her door asking her to close down the said Balwadi. The petitioner society is always at liberty to take such steps for preventing any alleged illegal activity in accordance with law. The members of the society, however, cannot take law into their own hands and physically prevent the member who is running the Balwadi.

9. In the circumstances, there is no merit in the submission made by the learned Counsel for the petitioner. There is no reason to interfere with the

impugned order which is passed by the Co-operative Appellate Court, Mumbai.

10. Writ Petition, accordingly, is dismissed. Rule is discharged. Under the circumstances, there shall be no order as to costs.

(V.M. KANADE, J.)